In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1204

CHARLES SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-12) is ~~not yet~~ reported at 372 F.2d 131.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1967 (Pet. App. 13). On March 2, 1967, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including

March 30, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was deprived of his right to assistance of counsel under the Sixth Amendment where, without objection, he was represented by an associate of his retained counsel who was unable to appear because engaged in another trial.

STATEMENT

In a jury trial in the United States District Court for the Eastern District of Pennsylvania petitioner was convicted of theft of an interstate shipment of goods from an air terminal in violation of 18 U.S.C. 659 (App. 1a, 3a).[1] On February 11, 1966, he was sentenced to imprisonment for five years (Pet. App. 9-10). On appeal the conviction was affirmed (Pet. App. 13).

The record shows that after petitioner pleaded not guilty on July 7, 1965, he remained free on bail (App. 1a). When the case was called for trial on January 5, 1966, petitioner informed the court that his attorney, Mr. Gilson, was not present since petitioner had not paid his fee (App. 4a, 5a). The court revoked bail and remanded petitioner to the custody of the marshal (App. 6a). On January 6, the court refused petition-

[1] "App." refers to Appellant's Appendix in the court of appeals.

er's request that he be released so that he could raise money to hire a lawyer, but stated that if petitioner could not get counsel the court would appoint counsel to represent him (App. 7a, 9a). On Friday, January 7, 1966, Mr. Gilson advised the court that he now represented petitioner, requested that bail be reinstated, and requested a continuance because of a trial commitment in a State court which he said would last "probably most of next week" (App. 11a-14a). This colloquy then ensued (App. 14a-15a):

> THE COURT: Then he [petitioner] better get other counsel, because he is either going to go to trial this afternoon or Monday. * * * The case was called. It wasn't ready. I am not going to sit around on it. Now, I will let him out until Monday.
>
> MR. GILSON: Perhaps I can arrange—
>
> THE COURT: Either you better be here Monday or get other counsel for him.
>
> MR. GILSON: Another associate in the office, perhaps, your Honor.
>
> THE COURT: I don't care who you get, but he is going to trial Monday. He should go this afternoon. * * * We will reinstate his bail until 10:00 o'clock Monday morning.

On Monday, January 10, 1966, petitioner appeared in court with Mr. Pelagatti, an associate of Mr. Gilson (App. 16a, 17a). The trial was held on January 11, the following day (App. 23a).

ARGUMENT

Petitioner was not deprived of his right to assistance of counsel in violation of the Sixth Amendment,

as he now contends. There is no conflict between *United States* v. *Johnston*, 318 F.2d 288 (C.A. 6) and the decision below. In *Johnston* the defendant had learned only a few days before trial that the counsel whom he had retained two years earlier would be unavailable on the trial date. Here, on the other hand, six months after petitioner had been arraigned and released on bail, he appeared without counsel when his case was called for trial on January 5. He had not at that late date retained counsel, although he was apparently negotiating for Mr. Gilson's services (App. 5a, 8a). Under these circumstances, the trial court was entirely justified in making it clear that petitioner would not be allowed to delay the trial beyond the week-end. Moreover, unlike the defendant in *Johnston*, petitioner at no time objected to the trial being conducted by Mr. Gilson's associate, Mr. Pelagatti. See *Barber* v. *United States*, 227 F.2d 431 (C.A. 10); *Moore* v. *United States*, 220 F.2d 198 (C.A.D.C.). Mr. Pelagatti was not forced upon petitioner by the trial court, but rather was suggested as a substitute by Mr. Gilson (App. 14a). Petitioner does not contend that Mr. Pelagatti did not have adequate time to prepare for the trial.

In these circumstances the court below properly rejected petitioner's contention that he was deprived of his right to assistance of counsel. *Neufield* v. *United States*, 118 F.2d 375, 383 (C.A.D.C.), certiorari denied, *sub nom. Ruben* v. *United States*, 315 U.S. 798; and see *United States* v. *Bentvena*, 319 F.2d 916, 936 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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